STATE OF MICHIGAN

COURT OF APPEALS

EBONY DUKES, by her Next Friend, TRACY HUGHES and TRACY HUGHES, individually,

Plaintiffs-Appellants/Cross-Appellees,

v

HARPER-HUTZEL HOSPITAL, f/k/a HUTZEL HOSPITAL,

Defendant-Appellee/Cross-Appellant,

and

DAVID BEACH COTTON, M.D.

Defendant-Appellee.

UNPUBLISHED
January 30, 2007

No. 255824
Wayne Circuit Court
LC No. 00-030844-NH

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

In this malpractice action, plaintiffs, Ebony Dukes (minor-plaintiff), by her mother Tracy Hughes acting as next friend, and Hughes in her individual capacity (plaintiff-mother), appeals as of right from the order granting summary disposition under MCR 2.116(C)(10) to defendants, Harper-Hutzel Hospital (defendant-hospital) and David Beach Cotton, M.D. We affirm.

I

Tracy Hughes was admitted to defendant-hospital on December 2, 1998 at approximately 8:20 a.m. and delivered the minor-plaintiff on December 3, 1998 at approximately 3:17 p.m. At some point during or after the delivery, the minor-plaintiff suffered undefined seizures and a neurological injury to her brain.

On September 20, 2000, plaintiffs filed a complaint alleging defendants breached the standard of care in failing, among other things, to perform a caesarian section (C-section), failing to recognize fetal distress, failing to obtain a scalp pH, and failing to "properly take those steps

necessary to provide a safe labor and delivery for the ultimate delivery" of the minor-plaintiff. An affidavit of merit executed by Ronald G. Zack, M.D. accompanied the complaint.

Following discovery, defendants collectively filed a motion in limine to strike plaintiffs' causation theory or in the alternative, for a *Davis-Frye*[1] evidentiary hearing on the grounds that plaintiffs' causation theory was inadmissible because of its scientific unreliability and as such, plaintiffs were unable to establish causation. Defendants challenged plaintiffs' theory that the minor-plaintiff suffered brain damage in utero as a result of decreased blood flow through the placenta and umbilical cord resulting in decreased oxygen to the brain (hypoxia and/or asphyxia and/or ischemia) on the basis that the plaintiff's theory is contrary to established medical authority. Citing to thirteen published medical authorities, including an American College of Obstetrics and Gynecology (ACOG) article, ACOG Technical Bulletin No. 163, Fetal and Neonatal Injury, defendants argued that if hypoxia and/or ischemia severe enough to cause brain damage had occurred, symptoms of "neurologic syndrome" would have been present immediately after the minor-plaintiff's birth and during the first few days after birth, and that the infant would have demonstrated abnormal activity, seizures and problems with feeding. The record did not establish these evidentiary findings. Defendants further argued, contrary to plaintiffs' theory, that to establish hypoxia/ischemia and poor neurological outcome, there must be evidence establishing that the umbilical cord pH is less than 7.0. The evidence in this case was that the umbilical cord pH level was 7.27. Alternatively, defendants requested a *Davis-Frye* hearing to determine whether plaintiffs' experts' opinions gained general acceptance within the medical community.

In response to defendants' motion to strike, plaintiffs argued that the motion was premature as Dr. Gabriel was scheduled for depositions. Alternatively, plaintiffs argued that Dr. Gabriel's testimony was scientifically reliable, thus a *Davis-Frye* hearing was unwarranted. The trial court took the matter under advisement pending Dr.Gabriel's deposition.

Dr. Gabriel opined in his deposition that the minor-plaintiff suffered brain damage in utero due to hypoxia through a "hyper-acute event" a few minutes before birth, resulting from an infection of the plaintiff-mother's chorionic and amniotic membranes (chorioamnionitis). Before reaching his conclusion, Dr. Gabriel had reviewed an ultrasound, x-rays and CT scan, as well as medical and hospital reports pertaining to the minor-plaintiff. Dr. Gabriel, relying on his previous experience as an expert witness where defendant–hospital was a party, further testified that he previously submitted "three-or four of the most current or the most well-researched papers" on the association between acute chorioamnionitis and decrease perfusion, which had been reported in the medical literature. Dr. Gabriel acknowledged that an umbilical pH of 7.28 [sic] would be considered normal; however, he challenged defendants' theory that a pH level less than 7.0 was required to establish hypoxia/ischemia and poor neurological outcome. According to Dr. Gabriel, the presence of significant metabolic acidosis was nonetheless demonstrated by

---

[1] See *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955); *Frye v United States*, 293 F 1013 (DC App, 1923).

the base excess value of minus 8 as well as a low Apgar[2] score. Dr. Gabriel explained that the normal range for base excess is "[b]etween plus two and minus two," and a base excess of minus eight was indicative of metabolic acidosis and [g]iven the child's other complications, that probably was a [venous] maternal pH" versus an arterial[3] cord pH.

After Dr. Gabriel's deposition, defendants filed a supplemental brief requesting that the trial court strike his testimony as scientifically unreliable given his failure to cite any studies to support his theory. To refute Dr. Gabriel's testimony, defendants attached two medical articles, which address the specific mechanism underlying his theory. These articles, *Doppler Evaluation of the Fetoplacental Circulation in the Latent Phase of Preterm Premature Rupture of Membranes* and *Clinical Chorioamnionitis is Not Predicted by Umbilical Artery Doppler Velocimetry in Patients with Premature Rupture of Membranes*, analyzed tests using utrasonography to measure umbilical blood flow and both articles concluded that chorioamnionitis does not cause decreased placental blood flow to the fetus. Defendants' supplemental brief also cited to Dr. Gabriel's testimony that the minor-plaintiff did not exhibit and signs of motor problems or cerebral palsy, conditions historically associated with prenatal hypoxia and a subsequent neurological injury. Finally, defendants cited to plaintiffs' own obstetrical experts, who both testified that chorioamnionitis was an insignificant factor in this case, in further support of their contention that Dr. Gabriel's testimony lacked foundation.

In response to defendants' supplemental brief, plaintiffs, citing *Anton v State Farm*, 238 Mich App 673; 607 NW2d 123 (1999), principally argued that defendants' evidence contradicting Dr. Gabriel's theory was not dispositive of the scientific reliability of his testimony. Plaintiffs argued that under *Anton*, a single reference in the literature theorizing a causal link is sufficient to meet the threshold to admit expert testimony. Plaintiffs further argued that more than 35 years of research exists supporting the theory that a fetus can suffer harm in utero, either by a decrease in oxygenation which can be detected by fetal strips, a low Apgar score, a core ph, a base excess, "or it may not show up at all, other than the reading of neuro imaging studies that are sophisticated enough to detect a problem." By way of evidentiary support, plaintiffs relied extensively on Dr. Gabriel's deposition testimony where he, without giving the specific years or titles of studies, discussed medical literature generally supporting his theory. To buttress Dr. Gabriel's statements that he previously submitted articles to defendant-hospital's legal defense firm, plaintiff attached a bibliography of articles discussing "watershed perinatal hypoxic-ischemic central nervous system damage." In addition, plaintiffs submitted excerpts and synopses of articles, including an article written by a Michigan attorney for *Michigan Lawyer's Weekly* that "fully support Dr. Gabriel's testimony." To explain the conflicting opinions between Dr. Gabriel and Dr. Zack, plaintiffs argued that Dr. Zack was not going to provide causation testimony.[4]

---

[2] An "Apgar score" is a numerical scoring, ranging from 1 to 10 (with 10 representing the highest value) rating a newborn's color, respiration, tone and reflexes.

[3] A venous sample measures maternal blood gases and an arterial sample measures fetal oxygenation.

[4] Plaintiffs did not address the conflicting causation testimony given by Dr. Berke.

Meanwhile, on August 27, 2002, plaintiffs filed a motion for a default judgment or summary judgment arguing that dismissal was warranted in favor of plaintiffs because defendant-hospital failed to file an affidavit of meritorious defense. On September 5, 2002, the trial court heard a variety of motions, including plaintiffs' motion for default judgment. Plaintiffs also presented the trial court with an untimely motion in limine to exclude testimony pertaining to the plaintiff-mother's history of substance abuse or to any references that she was incarcerated at the time she went into labor. The trial court agreed that defendant-hospital was required to file an affidavit of merit, but it determined that a default judgment was not mandatory and instead, allowed plaintiffs to argue their untimely motion in limine.

Three hearings were held on defendants' motion to strike on September 6, 2002, September 9, 2002, and September 18, 2002. The multiple hearings were required as the trial court provided plaintiffs several opportunities to cite to any portion of Dr. Gabriel's testimony that established the scientific reliability of his testimony. At the September 9, 2002, hearing, plaintiffs' counsel, despite 115 pages of deposition testimony provided by Dr. Gabriel, informed the trial court he was unprepared to give the trial court a detailed response or to argue from the literature or the deposition testimony. Given the trial court's expressed reluctance to strike plaintiffs' causation testimony, the trial court "reluctantly allow[ed]" plaintiffs "a last gasp opportunity to present in writing any information" to establish the scientific reliability" of Dr. Gabriel's causation testimony. At the conclusion of the September 18, 2002, hearing, and hearing extensive arguments, the trial court did not render a decision, and instead, stated that it needed to determine whether Dr. Gabriel's testimony was relevant, i.e., in accord with established facts or whether, assuming the testimony was relevant, whether it satisfied the sufficient indicia of scientific reliability standard under *Davis-Frye*. On March 12, 2004, the trial court orally granted defendants' motion for summary disposition on the record.[5] After reviewing the supporting documentation and depositions provided by the parties and "pull[ing] certain copies of the material alluded to by the Plaintiff," the trial court struck Dr. Gabriel's testimony on the grounds of relevance. Because plaintiffs could not provide testimony on causation, the trial court granted summary disposition in favor of defendants. Citing plaintiffs' supporting documentation and reliance on the *Michigan Lawyer's Weekly* article, the trial court determined that the article "although interesting, is not competent scientific evidence or authority." Similarly, the trial court provided a synopsis of defendants' supporting documentation, giving special attention to the ACOG Bulletin 163:

> ACOG Bulletin 163 summarizes the most generous view of some causal link between hypoxia and ischemia in utero and neurological deficit in children where four factors are present. Those factors are a p[H] of less than 7.00, Apgar scores of less than three for five minutes or more post–birth, seizures, coma or hypotonia and multi-organ system dysfunction.
>
> The Court does not believe that every disagreement amongst competent experts should resulted [sic] in a *Davis-Frye* or a *Daubert-Kuomo* hearing. The

[5] The trial court's opinion and order striking causation testimony and granting summary disposition in favor of defendants was not entered until May 11, 2004.

instant case provides a circumstance in which such a hearing is not required. The Court accepts the Defendant's [sic] assertion that *Nelson [v] American Sterilizer ([O]n [R]emand)*, 223 Mich. App., 485 (1987) [sic] and M.C.L. 600.2955 are controlling. Both the case and the statute require that there be sufficient indicia of scientific reliability. Scientific reliability does not require that there be mirror image studies available upon which the trier of fact could compare an absolute apple to another absolute apple. Instead, there must be material which have been subjected to appropriate scientific, rigorous standards upon which the Judge could conclude that there is some indicia of reliability. Owing to the fact that the Defendants' own ACOG Bulletin 163 acknowledges that there is some evidence of a causal connection between the events which Plaintiff asserts occurred during the delivery of this child and neurological injury, the Court believes that there is no reason for a *Davis-Frye* hearing.

However, the Defendant has also presented a plethora of literature that supports the need for all four of the criteria stated below to be present to establish a scientific reliable basis for the causation testimony. Plaintiff's article from Lawyer's Weekly does assert that there is literature which challenges the need for all four criteria. Plaintiff, however, did not furnish this literature nor an excerpt from this literature for the Court's review. The Court did begin the process of reviewing some of the materials in the bibliography offered by the Plaintiff, but concluded that that was both inappropriate and not helpful. This Court is, therefore, left to determine if all four criteria are present in this case from the materials presented.

A review of the record demonstrates that the Plaintiff has a plausible case that there are three factors in the medical history of this child, seizure, multi-system organ dysfunction and low Apgar scores. While the Apgar scores are not the classic 1-3 within 3 minutes of birth, Dr. Gabriel presents competent testimony challenging the efficacy of the Apgar score of six, which is recorded in the medical record. However, there is no evidence in the record of a p[H] of less than seven. The record reveals a cord p[H] of 7.27.

The causation testimony is only relevant if there is evidence of all four criteria. It is therefore irrelevant to this case. Without relevant causation testimony, the Court must dismiss the case and enter an order of no cause on behalf of the Defendants. [(Emphasis to case cites added).]

Plaintiffs now appeal the trial court's order granting summary disposition to defendants.

II

A trial court's determination whether a witness is qualified to serve as an expert witness and the actual admissibility of the expert's testimony will not be reversed absent an abuse of discretion. *Tate v Detroit Receiving Hosp*, 249 Mich App 212, 215; 642 NW2d 346 (2002). Similarly, the grant or denial of motion for default judgment for failing to file an affidavit of meritorious defense is reviewed for an abuse of discretion. *Costa v Community Emergency Med Svcs*, 263 Mich App 572, 581; 689 NW2d 712 (2004).

When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Id.*

III

A

Before addressing the issue squarely before this Court, we must first address an ancillary dispute between the parties as to whether the current or predecessor version of MRE 702 is applicable.[6] At the time defendants' motion to strike was heard, the prior version was in effect; however, the trial court ruled on the matter after MRE 702 was amended.[7]

This Court addressed the rule pertaining to the prospective or retroactive application of court rules in *Reitmeyer v Schultz Equipment & Parts Co*, 237 Mich App 332, 337-343; 602 NW2d 596 (1999), where this Court recognized that MCR 1.102 indicates that a new rule should generally apply to all pending cases, but recognized that application of an amended rule is within the trial court's discretion if it would work an injustice on a party who acted in reliance on the consequences of the prior rule. See also *Davis v O'Brien*, 152 Mich App 495, 393 NW2d 914 (1986) (an injustice occurs where a party acts or fails to act in reliance on the prior rules and his action or inaction has consequences under the new rules which were not present under the old rules).

Although *Reitmeyer* concerned the retroactive application of an amended court rule, MCR 2.405, and not a rule of evidence, this Court in *Reid v A H Robins Co*, 92 Mich App 140, 143; 285 NW2d 60 (1979), held that amendments to the Michigan Rules of Evidence should be treated as amendments to the court rules and thus amendments to rules of evidence were applicable to pending actions as well as other actions tried after March 1, 1978.

---

[6] Defendant-hospital and plaintiffs are in agreement that the amended version is applicable. However, defendant Cotton contends plaintiffs abandoned the claim, first raised on appeal, that the trial court failed to apply the amended version given plaintiff's failure to raise the issue in (1) a supplemental motion between the effective date of the current version and the date the trial court's opinion was issued, or (2) a motion for reconsideration. Alternatively, defendant Cotton contends the predecessor version is inapplicable as the current version of MRE 702 was not in effect at the time the trial court heard defendants' motions but nonetheless argues that under either version, Dr. Gabriel's testimony was properly stricken.

[7] MRE 702 was amended effective January 1, 2004.

In *People v Allen*, 429 Mich 558, 608-609; 285 NW2d 60 (1988), the Supreme Court promulgated an amendment to MRE 609(a) to apply to all cases "tried" after March 1, 1988. In doing so, the Court stated:

> [Because] parts of the amendment of MRE 609 are "clear breaks" in our jurisprudence . . . we will apply them only prospectively. See, e.g., *Tebo v Havlik*, 418 Mich 350; 343 NW2d 181 (1984). Accordingly, the amendment of MRE 609 will take effect March 1, 1988. Trials begun before that date will be governed by the existing version of MRE 609 as interpreted by this opinion.

Accordingly, consistent with MCR 1.102 and MRE 102,[8] we conclude that that application of the amended MRE 702 will work an injustice, given (1) the eighteen-month delay between the hearings and the trial court's decision in March 2004, (2) that, as observed by the trial court, discovery in this case was protracted at great expense, and (3) plaintiffs' failed to request application of the current version of MRE 702 in either a supplemental motion between the effective date of the current version of the rule and the date the trial court rendered its decision, or in a motion for reconsideration. "An appellant cannot contribute to error by plan or design and then argue error on appeal." *Munson Med Center v Auto Club Ins Ass'n*, 218 Mich App 375, 388; 554 NW2d 49 (1996). We therefore find no abuse of discretion in the trial court's reliance on the predecessor version of MRE 702.[9]

B

Plaintiffs argue that the rigid formula for admitting expert testimony under the *Davis-Frye* standard was abandoned in favor of the more flexible standard enunciated in *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), when the Supreme Court amended MRE 702. Plaintiffs contend that scientific unanimity is not

---

[8] MRE 102 provides:

> These rules are intended to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

[9] Accordingly, we reject plaintiffs reliance on *Craig v Oakwood Hosp*, 471 Mich 67, 79; 684 NW2d 296 (2004), for the proposition that a trial court's decision regarding the admissibility of expert testimony is evaluated under the version of MRE 702 in effect when the trial court decided the issue. *Craig* is distinguishable as (1) the defendant's motion to strike the plaintiffs' expert or request for a *Davis-Frye* hearing was filed prior to the effective date of the amended version of MRE 702, (2) the trial court's decision to deny the motion for a *Davis-Frye* hearing occurred prior to the effective date of the amended version of MRE 702 and (3) the subsequent trial occurred prior to the effective date of the amended version of MRE 702. See e.g. *Craig v Oakwood Hosp*, 249 Mich App 534; 643 NW2d 580 (2002). Accordingly, neither the trial court, this Court nor the Supreme Court was required to determine whether MRE 702 as amended applied retroactively or prospectively.

required, thus an expert is not required to submit the actual medical articles for a court to review in deciding a motion for summary disposition. Instead, plaintiffs contend the trial court, taking into consideration the proposed expert's experience and citation to relevant medical articles, is obligated to conduct its own inquiry to determine that the principles and methodology employed by an expert in arriving at his theories were inadequate or unreliable. Given our conclusion, *supra*, that the predecessor version of MRE 702 applies, we disagree.

In malpractice actions, each party is obligated to provide an expert witness to articulate the applicable standard of care involved. MCL 600.2912d(1). Expert testimony is generally required to establish a prima facie case of medical malpractice, including causation. *Locke v Pachtma*n, 446 Mich 216, 230; 521 NW2d 786 (1994).

The *Davis-Frye* rule, adopted from *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955), and *Frye v United States*, 54 US App DC 46; 293 F 1013 (1923), provides that novel scientific evidence is admissible only if the proponent of that evidence demonstrates, through disinterested and impartial experts, that it has gained general acceptance in the scientific community. *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 468; 624 NW2d 427 (2000); *Anton, supra* at 678-679. In conducting a *Davis-Frye* inquiry, a trial court is not concerned with the ultimate conclusion of an expert, but rather with the method, process, or basis for the expert's conclusion and whether it is generally accepted or recognized. *Anton*, *supra* at 678-679.

Before MRE 702 was amended, the rule provided:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Accordingly, under the predecessor version of MRE 702, the proponent of expert testimony was required to establish (1) that the expert witness was qualified,[10] (2) that the proposed testimony would assist the trier of fact to either understand the evidence or determine a fact in issue, i.e. relevant, and (3) that the proposed testimony was based on a recognized form of "scientific, technical or other specialized knowledge."[11] *Craig*, *supra* at 79.

---

[10] To determine the qualifications of an expert witness in a medical malpractice case, MCL 600.2169(2) requires the court to evaluate (a) the witness' educational and professional training, (b) the witness' area of specialization, (c) the length of time the witness has been engaged in the active clinical practice or instruction of the specialty, and (d) the relevancy of the witness' testimony. MCL 600.2169; *Tate*, *supra* at 217.

[11] MRE 702 now provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or

(continued…)

The admissibility of scientific expert testimony is also governed by MCL 600.2955(1), which provides:

> (1) . . . In making that determination [that the opinion is reliable and relevant], the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:
>
> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
>
> (b) Whether the opinion and its basis have been subjected to peer review publication.
>
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
>
> (d) The known or potential error rate of the opinion and its basis.
>
> (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
>
> (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
>
> (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

In this case, plaintiffs failed to satisfy either MRE 702 or MCL 600.2955(1). Dr. Gabriel acknowledged that the minor-plaintiff did not exhibit any signs of motor problems or cerebral palsy, conditions historically associated with prenatal hypoxia. More importantly, Dr. Gabriel was unable to cite to any studies to support his theory, other than to state that it had been "discussed in the literature."

Further, although plaintiff cited to *Michigan Lawyer's Weekly* and other "synopses" of studies as supporting authority for Dr. Gabriel's testimony, the trial court properly rejected these, as plaintiff was unable to cite to or explain the methodology therein. In contrast, defendants provided two medical articles, which address and refute the specific mechanism underlying his

---

(…continued)

> education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

theory. In addition, Dr. Gabriel's proposed testimony would not assist the trier of fact determine a fact in issue as his testimony was not in accord with the established facts. The ACOG Bulletin 163 outlined the four generally recognized factors necessary to establish a causal link between hypoxia and ischemia in utero and neurological deficit: (1) a p[H] of less than 7.00, (2) Apgar scores of less than three for five minutes, (3) more post–birth, seizures, coma or hypotonia and (4) multi-organ system dysfunction. However, in this case, the medical record evidence shows that an umbilical cord pH of greater that 7.0 was present in this case—7.27. Yet, without any justification or supporting evidence, Dr. Gabriel theorized the pH score in this case was false. Mere skepticism or disparagement of medical findings is insufficient to support an expert opinion. *Badalamenti v Beaumont Hosp-Troy*, 237 Mich App 278, 288-289; 602 NW2d 854 (1999). Moreover, while an expert witness need not rule out all alternative causes of the effect in question, he must have an evidentiary basis for his own conclusions that are based on assumptions that are in accord with the established facts. *Green v Jerome-Duncan Ford, Inc*, 195 Mich App 493, 498-499; 491 NW2d 243 (1992).

Plaintiffs nonetheless argue that although defendants' literature established that the great majority of infants are not brain damaged where the fetal arterial cord pH was below 7.0, defendants' literature failed to eliminate (1) the potential harm to the "minority" or infants or (2) the possibility that a pH level in excess of 7.0 will not have a neurologic outcome. Plaintiffs misapprehend their burden to survive a motion for summary disposition.

To establish causation in a medical malpractice case, a plaintiff must present "substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Baldalamenti, supra* at 285. As noted in *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994):

> [A] causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred.

Accordingly, to establish the relevancy of Dr. Gabriel's testimony, plaintiff was required to present evidence of a neurological outcome in infants with umbilical cords with pH levels in excess of 7.0 to establish causation based on "generally accepted [views] within the relevant expert community," or demonstrate that his novel theory "has achieved general scientific acceptance among impartial and disinterested experts in the field." Failing to do either, the trial court did not abuse its discretion when it determined that Dr. Gabriel's testimony was irrelevant. *Green, supra.* The trial court properly performed its role as gatekeeper under MRE 702 and MCL 600.2955.[12] Having failed to create a material dispute of fact regarding causation, the trial court properly granted summary disposition to defendants. *Nelson, supra* at 498-499.

---

[12] Because MRE 702 as amended incorporates the *Daubert* test into the MRE 702, we note that although the trial court decided defendants' motion under the predecessor version of MRE 702, it (continued…)

C

We decline to address plaintiffs' next argument that the trial court erred when it refused to enter either a default judgment against defendant Harper or an order of summary disposition in favor of plaintiffs under the theory that defendants should be held to the same standards as that of malpractice plaintiffs who have their complaints dismissed for failing to comply with MCL 600.2912.[13] Plaintiffs affirmatively abandoned this argument at the September 5, 2002, hearing by stating "*I don't want to see their pleadings struck because I think* [MCL 600.2912] *is ridiculous*." By renouncing the form of relief requested in their motion, plaintiffs contributed to the trial court's decision to not grant the motion, which precludes an argument on appeal that the trial court erred in failing to enter an order of default or grant plaintiffs' motion for summary disposition. *Munson Med Center, supra* at 388.

Even if we were to review the issue, we would nonetheless conclude plaintiff has not established reversible error. This Court has previously rejected similar claims by plaintiffs that a defendant's failure to file an affidavit of meritorious defense pursuant to MCL 600.2912e in a medical malpractice action requires a default or sanction precluding the defendant from presenting a defense. See *Costa, supra* at 580-581 (a default judgment is not mandatory under MCL 600.2912e); *Kowalski v Fiutowski,* 247 Mich App 156, 165-166; 635 NW2d 502 (2001)

(…continued)

is unlikely that Dr. Gabriel's testimony would be admissible under MRE 702 as amended. As recognized by the Supreme Court, the trial court's gatekeeper role is the same under *Davis-Frye* and *Daubert*. *Gilbert v DaimlerChrysler Corp,* 470 Mich 749, 782; 685 NW2d 391 (2004). "Regardless of which test the court applies, the court may admit evidence only once it ensures, pursuant to MRE 702, that expert testimony meets that rule's standard of reliability." *Id*.

> MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology. *Id.*

In this case, given Gabriel's repeated inability to cite to or explain the methodology within his supporting documents as well the erroneous factual basis supporting his theory, the trial court could reasonably conclude that plaintiffs have not established that Gabriel's theory was based on reliable principles and methodology. MRE 702.

[13] MCL 600.2912e, reads in relevant part:

(1) In an action alleging medical malpractice, within 21 days after the plaintiff has filed an affidavit in compliance with section 2912d, the defendant shall file an answer to the complaint. Subject to subsection (2), the defendant or, if the defendant is represented by an attorney, the defendants attorney shall file, not later than 91 days after the plaintiff or the plaintiff's attorney files the affidavit required under section 2912d, an affidavit of meritorious defense signed by a health professional who the defendants attorney reasonably believes meets the requirements for an expert witness under section 2169 . . . .

(although a default is a permissible remedy, a trial court errs by believing it lacks discretion to fashion any other appropriate sanction and further declining to equate a defendant's failure to file an affidavit of meritorious defense to a plaintiff's failure to file an affidavit of merit, determining that the circumstances and goals of the parties are distinct); *Wilhelm v Mustafa*, 243 Mich App 478, 483-486; 624 NW2d 435 (2000) (the trial court was not compelled by statute to enter a default against defendant for his failure to timely file an affidavit of meritorious defense).

In this case, because the trial court's stated reasons in fashioning a remedy are supported by the record, we find no abuse of discretion. Having determined that summary disposition was properly granted, we need not address the merits of defendants' issues raised on cross-appeal.

Affirmed.

/s/ Kathleen Jansen
/s/ Kurtis T. Wilder